IN THE COURT OF APPEALS OF IOWA

No. 9-990 / 09-1064
Filed February 10, 2010

CORTNEE HEMESATH,
Petitioner-Appellee,

vs.

JOHN BRICKER,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Kristin Hibbs, Judge.

John Bricker appeals from the district court's refusal to grant his requested custody order. **AFFIRMED IN PART AND REVERSED IN PART.**

David Burbidge of Johnston, Stannard, Klesner, Burbridge & Fitzgerald, P.L.C., Iowa City, for appellant.

Guy P. Booth, Cedar Rapids, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

John Bricker appeals the district court's refusal to grant his requested custody order. He argues the district court erred when it determined the parties' child should be allowed to leave her current elementary school in Iowa City to attend elementary school in Cedar Rapids (where the mother had moved). He further contends the court erred in denying his request to modify the care schedule. We affirm in part and reverse in part.

I. Background Facts and Proceedings.

This appeal stems from John's petition for modification of John Bricker and Cortnee Hemesath's dissolution decree that was entered on May 26, 2006. In the decree, the parties stipulated that they would share care, custody, and control of their daughter, R.H., who was born in April 1999. Under the custody arrangement, R.H. would spend roughly fifty percent of her time with each parent: she would spend Monday night with Cortnee; Tuesday and Wednesday nights with John; Thursday and Friday nights with Cortnee; Saturday nights with John; and she would alternate between her parents every other Sunday night. The parties further agreed that no child support would be awarded.

At the time the decree was entered, John lived in Cedar Rapids, Cortnee lived in Iowa City, and R.H. attended Horn Elementary School in Iowa City. Shortly after the decree was entered, John remarried and he and his wife moved to North Liberty. In October 2008, Cortnee had the opportunity to purchase her grandmother's house in Cedar Rapids. Upon her move to Cedar Rapids, Cortnee informed John that she planned to have R.H. attend Harrison

Elementary in Cedar Rapids, which was less than a half mile from her new home. John filed an application for an injunction to prevent R.H. from changing schools. John also filed a petition to modify the parties' decree seeking sole physical care of R.H. and an application and affidavit for rule to show cause. Ultimately, Cortnee consented to the entry of a temporary injunction, agreeing that R.H. would remain at Horn Elementary until the trial on the modification action.

The matter came before the court on June 15, 2009.[1] At trial, both parties agreed that shared care of R.H. should continue. John requested a change to the holiday schedule, and requested that he have R.H. every Sunday night instead of every other Sunday night.[2] The main issue before the court was which elementary school R.H. should attend beginning in the 2009-10 academic year.

Throughout the 2008-09 academic year, R.H. remained at Horn Elementary. During that time, Cortnee drove forty minutes from her home in Cedar Rapids with R.H. to take her to school on the days R.H. was staying with her; and John drove approximately twenty minutes from North Liberty with R.H. to take her to school on the days she was staying with him. R.H.'s teacher at Horn Elementary described R.H. as very friendly and outgoing, with a lot of friends. She also stated that R.H. was below average academically, and that she received extra help on her school work in the school's before/after school care program that she attended in the mornings and afternoons while Cortnee and John were at work.

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[1] The record of the trial suggests that the trial was held only upon John's petition for modification of child custody, but the district court did rescind the temporary injunction in its order filed July 1, 2009.

[2] The court denied these requests.

On July 1, 2009, the court entered an order finding that R.H. should be allowed to attend Harrison Elementary in Cedar Rapids. The court noted that John and Cortnee no longer lived in Iowa City and having R.H. continue to attend Horn Elementary in Iowa City required her to spend too much time in the car. The court concluded that attending Harrison Elementary would require significantly less travel for R.H. On days R.H. stayed with Cortnee in Cedar Rapids, she could walk to school or receive a short ride (the school was within a half mile from Cortnee's home). On days R.H. stayed with John, R.H. would have a twenty to twenty-five minute commute to school from John's home in North Liberty. The court noted that John's work frequently required him to travel to Cedar Rapids anyway, and John's wife went to Cedar Rapids almost daily for her work.

The court also considered several other factors in reaching its conclusion that R.H.'s best interests would be most appropriately served by attending Harrison Elementary in Cedar Rapids.[3] John now appeals.

II. Scope and Standard of Review.

We review the modification of a dissolution decree de novo. Iowa R. App. P. 6.907 (2009); *In re Marriage of McCurnin*, 681 N.W.2d 322, 327 (Iowa 2004). We give weight to the district court's fact findings, especially when we consider witness credibility, but we are not bound by those findings. Iowa R. App. P. 6.904(3)(*g*); *McCurnin*, 681 N.W.2d at 327.

[3] The court found that John had established a substantial change in circumstances warranting a ruling on the school issue only. Therefore, the court did not address John's request to alter the holiday care schedule, or award him care of R.H. every Sunday night.

To change the custodial provisions of a dissolution decree, the applying party must establish by a preponderance of the evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983). The party seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. *Id.*; *see also In re Marriage of Gravatt,* 371 N.W.2d 836, 838-40 (Iowa Ct. App. 1985). This burden stems from the principle that once custody of a child has been fixed, it should be disturbed only for the most cogent reasons. *In re Marriage of Mikelson*, 299 N.W.2d 670, 671 (Iowa 1980); *In re Marriage of Jahnel*, 506 N.W.2d 473, 474 (Iowa Ct. App. 1993).

III. Merits.

John argues the district court erred in refusing to grant his "custody order" and changes in the joint physical care schedule. John initiated this proceeding with an application to modify the decree, requesting that he be awarded physical care of R.H. John's application was a result of Cortnee's plan to move to Cedar Rapids and enroll R.H. into Harrison Elementary school in Cedar Rapids.

Notwithstanding his application for physical care, John testified that he and Cortnee should continue shared care of R.H., but asked that the court determine which school R.H. should attend. John contends there is no evidence that R.H. will do well in the Harrison Elementary, and that it is in her best interests to continue attending Horn Elementary.

The provisions of a dissolution decree may be modified when there has been a substantial change in circumstances. *See* Iowa Code § 598.21C(1) (2007). "However, not every change in circumstances constitutes a sufficient basis for modification." *In re Marriage of Chmelicek,* 480 N.W.2d 571, 574 (Iowa Ct. App. 1991). The court may consider the relocation of the child's residence to more than one hundred and fifty miles from his or her current residence a substantial change in circumstances for purposes of modification of physical care. Iowa Code § 598.21D (2009).[4]

The court determined that John established a substantial change in circumstances that warranted a ruling on the school issue only. With regard to the school issue, the court stated:

> At the time of the decree, both parties were willing to leave R.H. at Ernest Horn School. Cortnee lived in Iowa City and John lived in North Liberty. The shared care arrangement adopted by the Court and these parents requires frequent exchanges. The parents now living in different towns and the school being in a third community requires R.H. to spend too much time in a car. The Court finds that neither the parties nor the Court anticipated such a circumstance at the time of the Decree. A modification of the Decree should be made.
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> Based upon all of the evidence and the law, the Court finds that the temporary injunction previously ordered that prevented the parties from removing the child from her current school, Horn Elementary in Iowa City, should be rescinded. The parties' decree should be modified to allow Cortnee to enroll R.H. in Harrison Elementary in Cedar Rapids for the fall 2009 term and thereafter.

Although we agree that the temporary injunction should be dissolved, we disagree that the decree should be modified.

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[4] This section attempts to allow for substantial parental involvement in a child's life by both parents even when there has been a marriage dissolution. *In re Marriage of Mayfield*, 577 N.W.2d 872, 874 (Iowa Ct. App. 1998).

This is a case where two joint custodians simply disagree in respect to which school their child attends. Neither the decree nor the stipulation mandates that R.H. attend any particular school. As legal custodians of R.H., both Cortnee and John are entitled to certain rights and responsibilities that "include, but are not limited to, decision making affecting the child's legal status, medical care, education, extracurricular activities and religious instruction." Iowa Code § 598.1 (5). We acknowledge that John has requested a modification of the joint physical care schedule; however, we view this request more akin to a change in visitation rights than a request for a change in custody or physical care. *See Nauditt v. Haddock*, 882 So.2d 364, 367 (Ala. Civ. App. 2003). Further, the changes sought to the care schedule are unrelated to the school issue.

We acknowledge that our supreme court has ventured into a dissolution dispute involving the rights and responsibilities of legal custodians concerning a child's "legal status" when resolving a dispute over a child's legal name. *In re Marriage of Gulsvig*, 498 N.W.2d 725, 729 (Iowa 1993). We also acknowledge that our supreme court has resolved a dispute between joint legal custodians in regard to a child's medical care and records in an action initiated by a petition for injunctive relief. *Harder v. Anderson*, 764 N.W.2d 534, 538 (Iowa 2009). In *Harder*, the court stated:

> When joint legal custodians have a genuine disagreement concerning a course of treatment affecting a child's medical care, the court must step in as an objective arbiter, and decide the dispute by considering what is in the best interest of the child.

Id. However, we have concluded that any change in schools "must be weighed with all the other relevant conditions affecting physical care," in an action seeking

modification of physical care. *In re Marriage of Thielges*, 623 N.W.2d 232, 237-238 (Iowa Ct. App. 2000).

The difficulty here is that although John has raised some other circumstances such as his additional travel time, he no longer seeks a change in physical care or a modification of custodial rights. In essence, under the guise of a modification action, John asks that we not permit the change in schools because of the problems and inconveniences that he perceives that it creates. Although we accept our role as a final arbiter in disputes between legal custodians, when the decree does not address the issue in dispute, a modification action is not the appropriate vehicle to address the issue. If we entered this fray, there could be a specter of flooding in the district courts on other joint decision issues between joint custodians such as the child's extracurricular activities.[5]

Nevertheless, we find it necessary to consider the merits of the issue in this proceeding inasmuch as the district court "rescinded" the temporary injunction prohibiting R.H.'s move to a different school and modified the decree to provide that R.H. attend Harrison Elementary.

Cortnee's move from Iowa City to Cedar Rapids is clearly less than one hundred and fifty miles. Further, at trial, John agreed that shared care was best for R.H. Even assuming, *arguendo*, that the move had constituted a significant and material change in circumstances, John would still have to prove the change hinders R.H.'s welfare and that as a primary care parent, he would be better able

[5] A similar concern was expressed in the concurring opinion of *In re Marriage of Quirk*, 504 N.W.2d 879, 889 (Iowa 1995).

to minister to her well-being. *In re Marriage of Rosenfeld*, 524 N.W.2d 212, 214 (Iowa Ct. App. 1994) (noting that the burden on the parent seeking modification is heavy "because children deserve the security of knowing where they will grow up, and we recognize the trauma and uncertainty these proceedings cause all children.").

Upon our de novo review, we conclude John is unable to meet this burden of proof. R.H. has been in shared care for the last three years. The record indicates that both parents provide homes that are fostering, safe, and child-centered. The parents have shown admirable cooperation and communication with one another in reaching the shared care arrangement that is in place, and in successfully managing the arrangement. R.H. has shown to be a happy, outgoing, and well-adjusted child, who is involved in extracurricular activities. We find that the nurturing, responsible, active parenting received from both John and Cortnee as a result of the 50/50 care arrangement has been critical in promoting R.H.'s best interests. The record does not support a finding that John can render superior care, and the facts do not support a finding that the child should be removed from the custodial arrangement she has been thriving in throughout the past several years.[6]

Although R.H.'s tenure at Horn Elementary in Iowa City may have had some influence on her current state of happiness and well-being, the record indicates that R.H. will continue to be successful and happy at Harrison Elementary. In addition to less travel required of R.H. in attending Harrison

[6] This includes John's requests for modified vacation and Sunday night schedules.

Elementary instead of Horn Elementary, Harrison Elementary is able to accommodate any special needs R.H. may have academically. Additionally, neither parent lives in Iowa City; R.H. is outgoing and will likely make new friends easily; R.H. has extended family in Cedar Rapids; R.H. will begin attending Roosevelt Middle School in the 2010-11 school year, which is only one block away from Cortnee's home; and R.H. will be able to continue participating in her extracurricular activities in North Liberty and Tiffin.

Although we have reviewed the "school" issue in the context of a modification action, for the same reasons we also conclude by de novo review that John has failed to show that either he or R.H. will incur any irreparable injury to justify a continuation of the temporary injunction. *See Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 639-40 (Iowa 1991). When the move is less than 150 miles, and there is good reason for moving a child in our highly mobile society, stability in a child's life can be maintained by leaving the child with same custodial arrangement as it can by leaving them in the same neighborhood. *See In re Marriage of Whalen*, 569 N.W.2d 626, 630 (Iowa 1993).

We also do not determine by these facts that Cortnee unilaterally decided to change R.H.'s school, as she did seek input from John. In the future, we encourage both John and Cortnee to resolve their differences through mediation or a counselor so that they can continue to communicate as joint custodians for the best interests of R.H. If they are unable to communicate in the future, it may be preferable to vest the decision making power solely in either John or Cortnee. *See In re Marriage of Rolek*, 555 N.W.2d 675, 677 (Iowa 1996).

We have carefully reviewed the record and we agree with the district court that it is in R.H.'s best interests to maintain the current care arrangement and that the temporary injunction be dissolved. Therefore, we affirm the denial of the relief sought by John, but reverse the modification of the decree as unnecessary.[7]

AFFIRMED IN PART AND REVERSED IN PART.

[7] We have previously disapproved of decrees that specify that a child must reside in a specific community or attend a specific school. *See Thielges*, 623 N.W.2d at 237-238.